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No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1958

GILBERT H. MILLER AND G. H. MILLER AND COMPANY,
PETITIONERS

v.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON,
SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals on appeal (Pet. 1a–6a), on rehearing (Pet. 7a–9a), and on rehearing *en banc* (Pet. 10a–36a) are reported at 260 F. 2d 286. The findings and order of the Secretary of Agriculture (J.A. 1358–1402)[1] are reported at 15 Agric. Dec. 1015.

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* was entered on September 23, 1958. The peti-

[1] "J.A." references are to the joint appendix in the court of appeals.

tion for a writ of certiorari was filed on December 19, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the findings of the Secretary of Agriculture that petitioners had violated the Commodity Exchange Act were supported by a preponderance of the evidence.

2. Whether the remedial provisions of the Secretary's order bore a reasonable relation to, and were commensurate with, the violations of the Act.

3. Whether a retired circuit judge who participates in the initial decision of the court of appeals is an "active" circuit judge entitled to participate in a rehearing *en banc* under 28 U.S.C. 46(c).

STATUTES INVOLVED

The relevant provisions of the Commodity Exchange Act, 7 U.S.C. 1, *et seq.*, and of the Judicial Code, 28 U.S.C. 46(c), are set forth in the petition (pp. 2–4).

STATEMENT

The complaint which instituted the administrative proceeding alleged that ten individuals and certain companies had acted collectively, pursuant to understanding or agreement, to corner and manipulate the December 1952 egg futures market on the Chicago Mercantile Exchange (J.A. 19). It alleged that the respondents, who included the present petitioners, attained a "dominant and controlling" long position in that market, obtained control of the supply of deliverable eggs in Chicago, and placed themselves in a posi-

tion where they could and did "exact such prices as they saw fit" from the holders of short December 1952 egg futures contracts, and thereby caused the price of December 1952 egg futures contracts on the Chicago Mercantile Exchange and the price of cash eggs deliverable in Chicago in December 1952 to rise to an "artificial and manipulated level" (J.A. 23).

Fifteen witnesses testified for the Government at the administrative hearing, and the respondents neither testified nor called any witnesses on their behalf. Upon the basis of the evidence, the Hearing Examiner found that the respondents agreed to and did corner December 1952 egg futures and cash refrigerator eggs in Chicago, manipulate and raise the price of such futures and eggs, and force the "shorts" to pay excessive prices therefor (J.A. 1293). The Hearing Examiner's proposed order recommended that the registration of G. H. Miller and Company as a futures commission merchant and the registration of Gilbert H. Miller as a floor broker be revoked and that all contract markets be required to refuse trading privileges to all of the respondents for various periods running from 60 days to one year (J.A. 1298–9).

The proceeding was heard by the Judicial Officer[2] on exceptions to the Hearing Examiner's report. After making extensive findings of fact (J.A. 1363–85), he concluded that the respondents had, by understanding or agreement and concert of action, manipulated prices of December 1952 egg futures on the Chicago Mercantile Exchange and deliverable cash re-

[2] The Judicial Officer acted for the Secretary of Agriculture under a delegation of authority for that purpose. 10 F.R. 13769; 11 F.R. 177A–233; 18 F.R. 3219; 18 F.R. 3648; 19 F.R. 74.

frigerator eggs in Chicago, and cornered the market (J.A. 1383, 1389, 1394, 1398). He stated that the violations of Sections 6(b) and 9 of the Act which he had found "are of serious and far-reaching consequences" and that "appropriate sanctions should be ordered taking into consideration the different degrees of participation of the several respondents" (J.A. 1401). The order which he entered, like the order proposed by the Hearing Examiner, revoked the registration of the present petitioners, and denied them trading privileges on all contract markets for a period of one year (*ibid.*).

On review of the order by a three-judge panel of the court of appeals which included retired Judge Major, the court initially affirmed the order in all respects (Pet. 1a–6a). On rehearing, the same panel, by a 2–1 vote (with Judge Major in the majority), modified the remedial provisions of the order by directing that petitioners' registrations, instead of being revoked, be only suspended for six months and that they be allowed to execute hedging contracts in the meantime (Pet. 7a–9a). On rehearing *en banc,* from which Judge Major was excluded on the ground that 28 U.S.C. 46(c) limited the court *en banc* to "active circuit judges," the court, by a 4–1 vote, set aside the order on rehearing and reaffirmed the Secretary's order without modification (Pet. 10a–36a).

ARGUMENT

1. Petitioners contend (Pet. 11–12) that the court below "held that the petitioners' failure to testify could properly be held to supply facts not supported by the substantive evidence." The court plainly did

not so hold. It stated that "a careful reading of this record will disclose" that the Judicial Officer's findings and conclusions as to the cornering of the egg market and price manipulation "were sustained by a preponderance or the greater weight of the evidence," and that the evidence discloses "a long chain of circumstances which definitely established prima facie" that the respondents in the administrative proceeding had thus acted in concert (Pet. 5a–6a).[3] The court specifically stated that the burden resting upon the Government to prove its case by a preponderance of the evidence "cannot be met by failure of the petitioners to testify or call witnesses in their behalf" (Pet. 6a). The court's further statement (*ibid.*) that such failure to testify, *after* the Government's evidence had established a prima facie case, "most assuredly creates a presumption that their testimony would have been unfavorable to them", is in full accord with the decisions of this Court, *Interstate Circuit* v. *United States*, 306 U.S. 208, 226; *Local 167* v. *United States*, 291 U.S. 293, 298; *Bilokumsky* v. *Tod*, 263 U.S. 149, 153–155. See also Mr. Justice Frankfurter's concurring opinion in *Adamson* v. *California*, 332 U.S. 46, 60.

[3] The evidence respecting concerted action, including that by the present petitioners, shows, *inter alia*, the significantly different trading pattern of these respondents compared with all other traders in the market (J.A. 230–41, 1063–70, 1081, 2043–5, 2092–3, 2095, 2145–6); sales by Miller and Company for these respondents at uniform, maximum prices (J.A. 2049–52); their uniform withholding of eggs from the shorts (J.A. 157–8, 166–7, 1048–9, 2043, 2061–3, 2070–5); and the uniform price which they demanded and received for eggs after the close of trading (J.A. 306–7, 315–6, 332–3, 2059, 2061–3).

In all events, since the court of appeals found the Judicial Officer's order to be fully supported by the evidence of record, the question whether further support could be drawn from petitioners' failure to offer evidence is immaterial. In substance, petitioners are seeking nothing more than a second review of the evidence by this Court.

2. Petitioners contend (Pet. 13) that the case presents the question of whether a reviewing court is empowered "to modify a penalty imposed by the Secretary of Agriculture which the court found to be 'unduly harsh' ". Here again, petitioners pose a question not decided by the court below. The court did not reach the question of its statutory power to modify prohibitions deemed by it to be unduly severe. It found that the evidence fully supported the Judicial Officer's conclusions that the violations were "of serious and far-reaching consequences"[4] and that petitioner Gilbert H. Miller was "the captain of the 'team' " (Pet. 14a). The court concluded that on those findings the remedial prohibitions imposed—which were admittedly expressly authorized by the statute (Pet. 12a)[5]—"were certainly commensurate with the violation and in their imposition the Secretary of Agriculture did not abuse his discretion" and

[4] No violation of the Commodity Exchange Act is more serious than a corner. See Campbell, *Trading in Futures Under The Commodity Exchange Act*, 26 Geo. Wash. L. Rev. 215, 233–242.

[5] The statute expressly authorizes the Secretary to "revoke" the registration of a futures commission merchant or a floor broker who has violated the Act and to "require all contract markets to refuse such person all trading privileges for such period as may be specified in the order" (Pet. 3).

that on "this record no lack of reasonableness" in the remedy could be found (Pet. 14a).

The holding, therefore, was that the Secretary's order represented a reasonable and permissible exercise of the discretion vested in him in determination of the appropriate and necessary remedy, and that the prohibitions of the order bore a "reasonable relation to the unlawful practices found to exist". The decision is thus well within the principles so recently applied by this Court in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, in passing upon an administrative agency's determination of the appropriate remedy. The Court there said that "it is ordinarily not for courts to modify ancillary features of a valid [agency] order" and the agency's "discretionary determination should not be overturned in the absence of a patent abuse of discretion" (pp. 413, 414). To the same effect, see *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–429; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612–613; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194.

3. Petitioners' final contention (Pet. 16-18) is that the court below erroneously excluded Judge Major, a retired circuit judge, from participating in the rehearing *en banc*. Since the decision *en banc* was by a vote of 4 to 1, Judge Major's vote would not have changed the result. Furthermore, he had already voted to modify the Secretary's order (Pet. 8a), and the arguments in support of that view were before the court on the rehearing *en banc* (see Judge Schnackenberg's dissent (Pet. 33a–36a)).

Moreover, even assuming that exclusion of Judge Major, if erroneous, would be reversible error, it is clear that the court's decision on this point was correct. Section 46(c) of the Judicial Code (28 U.S.C 46(c)) provides: "A court en banc shall consist of all active circuit judges of the circuit." As there used, the word "active" stands in contra-distinction to "retired". As this Court observed in *Western Pacific Railroad Case,* 345 U.S. 247, 250–251, § 46(c) "is but a legislative ratification of *Textile Mills Securities Corp.* v. *Commissioner,* 314 U.S. 326." That decision had held that a court of appeals composed of all the circuit judges of the circuit "in active service" could properly sit *en banc* to hear and decide a case, and a footnote to the phrase "in active service" stated: "As distinguished from judges retired * * *." 314 U.S. at 327.

The interpretation placed on § 46(c) by the court below also serves to carry out the primary objective of the authority conferred—to avoid present or future conflict of decisions within a circuit. See 314 U.S. at 335; 345 U.S. at 260. If rehearings *en banc* are to promote finality of decision within the circuit, the decisions rendered should represent the views of the majority of the active circuit judges who constitute the court except for occasional service on it by district judges and retired circuit judges.

CONCLUSION

The decision below is plainly correct, and no issue is presented which warrants further review by this

Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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